

FCC MAIL SECTION

Before the  
Federal Communications Commission  
Washington, D.C. 20554

JUN 14 11 36 AM '95

MM Docket No. 92-59

In the Matter of

Amendment of Section 73.202(b), RM-7923  
Table of Allotments, RM-8042  
FM Broadcast Stations  
(Bradenton and High Point, Florida)

## MEMORANDUM OPINION AND ORDER

Adopted: June 7, 1995;

Released: June 14, 1995

By the Chief, Policy and Rules Division:

1. Before the Commission is a petition for reconsideration filed by ECI License Company, L.P., of our decision to substitute Channel 278C for Channel 277C1 at Bradenton, Florida, and to modify the license of Station WDUV(FM) to specify operation on the new channel. See *Report and Order* in MM Docket No. 92-59, 8 FCC Rcd 2576 (MMB 1993).<sup>1</sup> The licensee of WDUV(FM), Sunshine State Broadcasting Company, Inc., filed an opposition to ECI's petition, and ECI filed a reply to that opposition.

2. ECI argues that there is no location within the fully-spaced site zone for Channel 278C at Bradenton at which Sunshine would be permitted by the Federal Aviation Administration (FAA) to build a tower sufficiently high to meet the minimum spacing and coverage requirements for a Class C station. ECI contends that the *Report and Order* failed to address the merits of its aeronautical study, and that such failure was inconsistent with Commission precedent that allotments be based on a reasonable assurance that a suitable site is available that complies with the Commission's minimum separation requirements.<sup>2</sup> ECI notes that although the Commission will typically presume at the allotment stage that a theoretically usable site is available, it will take into account a showing that "in reality, no theoretical site[s] exist[ ] because of environmental, air hazard, or other similar considerations."<sup>3</sup> ECI argues that such is the case here in light of FAA restrictions and submits a preliminary FAA determination that the proposed construction would exceed FAA standards and would be an air safety hazard. ECI further contends that

Sunshine relies on events that have not yet taken place, such as the projected closing of nearby MacDill Air Force Base.<sup>4</sup>

3. Sunshine contends that ECI raises no new arguments that were not already resolved in the *Report and Order*. Sunshine asserts that it submitted an aeronautical study to rebut ECI's study and disputes ECI's arguments with respect to the theoretical availability of a suitable transmitter site. Sunshine does not point to a specific site that would be suitable, but contends that ECI fails to account for changes in the local airspace as well as the projected closing of MacDill Air Force Base.<sup>5</sup> Further, Sunshine challenges the *bona fides* of ECI in seeking out the preliminary FAA finding.<sup>6</sup>

4. In reply, ECI contends that the changes relied upon by Sunshine have not occurred, will not occur or do not have the effect claimed by Sunshine.<sup>7</sup> Further, ECI asserts that while the applicant is not required to establish that a site is available, it must establish that a site is suitable for tower construction.<sup>8</sup>

5. ECI raises no new issues or arguments that were not addressed previously in this proceeding. We continue to believe, as we stated in the *Report and Order*, that issues concerning FAA permissible site zoning problems are more appropriately addressed at the application stage where a specific transmitter site is before the Commission and the FAA. As we noted in *West Palm Beach*, *supra*, note 3, and as acknowledged by ECI, if it has been shown that a site exists that satisfies the Commission's technical rules, we will generally presume that the site is theoretically available at the allotment stage. A challenger may rebut that presumption by showing that no theoretical sites exist. We do not believe that ECI has met that burden. ECI and Sunshine submitted contradicting technical studies with respect to the feasibility of siting a Class C FM tower in the Bradenton area and, at this juncture, ECI has not shown that its study is superior.

6. We note that in its reply comments, ECI points out that our 1993 order establishing a one-step procedure for FM facility upgrades requires an applicant to demonstrate that the allotment reference site would be suitable for tower construction.<sup>9</sup> ECI contends that the Commission's statement that these requirements "merely follow our established practice" shows that the burden is on the applicant to show suitability. ECI fails to recognize, however, that the Commission's full statement was, "[o]ur actions herein do not expand the use of contour protection in any way, but merely follow our established practice."<sup>10</sup> That statement, which ECI cites out of context, was not intended as a reinterpretation of the presumption explained in *West Palm Beach*. While a one-step allotment/application process necessarily requires that the applicant make a suitability showing at the allotment stage, the two-step process carries no

<sup>1</sup> At the time of the *Report and Order* in this proceeding, the licensee entity for ECI's stations was Entertainment Communications, Inc. (Entercom). Since that time, Entercom's licenses have been assigned to ECI, of which Entercom is the sole general partner.

<sup>2</sup> ECI Petition at 1-4.

<sup>3</sup> *Id.* at 5 (quoting *Memorandum Opinion and Order* in MM Docket No. 87-438, 6 FCC Rcd 6975, 6976 (MMB 1991) (*West Palm Beach*)).

<sup>4</sup> *Id.* at 8.

<sup>5</sup> Sunshine Opposition at 1-5.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> ECI Reply at 2-3, 5-7.

<sup>8</sup> *Id.* at 3-4.

<sup>9</sup> ECI Reply at 3-4 (citing *Report and Order* in MM Docket No. 92-59 (*FM One-Step Applications*), 8 FCC Rcd 4735, 4737 n.19 (1993)).

<sup>10</sup> *Id.* at 4737.

such requirement. Rather, the burden is on the challenger to show that no theoretical sites exist in the relevant geographic area.

7. In light of the foregoing, IT IS ORDERED that the Petition for Reconsideration filed by ECI License Company, L.P. of the *Report and Order* in MM Docket No. 92-59 IS DENIED.

8. For further information concerning this proceeding, contact Jane Hinckley Halprin, Mass Media Bureau, (202) 776-1653.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink  
Chief, Policy and Rules Division  
Mass Media Bureau